18

FILED
MAR 2 1953
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1952

No. 639

SANFORD SERVICE COMPANY,
Petitioner - Appellant Below,

versus

HAROLD CASWELL,
Respondent - Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

EBERHARD P. DEUTSCH,
Proctor for Petitioners.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

INDEX

PAGE

I—QUESTION PRESENTED 1

II—JURISDICTION AND OPINIONS BELOW 2

III—SUMMARY STATEMENT OF MATTER INVOLVED 2

IV—REASONS RELIED ON FOR ALLOWANCE OF WRIT 3

TABLE OF AUTHORITIES.

Cases:

Bothwell vs United States, 254 US 231, 41 S. Ct. 74, 65 L. ed. 238 (1920) 4

Cox vs Shreveport Packing Co., 213 La. 53, 34 S2d 373 (1948) 4

Downer vs Southern Union Gas Co., 53 NM 354, 208 P2d 815 (1949) 5

Federal Land Bank vs Birchfield, 173 Va. 200, 3 SE2d 405 (1939) 5

Garrett vs Moore-McCormack Co., 317 US 239, 63 S. Ct. 246, 87 L. ed. 239 (1942) 4

Geib vs Slater, 320 Mich. 316, 31 NW2d 65 (1948) 5

Giles vs Smith, 80 Ga. App. 540, 56 SE2d 860 (1949) 5

Hall-Scott Motor Car Co. vs Universal Ins. Co., 122 F2d 531 (CA 9-1941), cert. den., 314 US 690, 62 S. Ct. 360, 86 L. ed. 552 4

Harrington vs Empire Const. Co., 167 F2d 389 (CA 4-1948) 4

TABLE OF AUTHORITIES—(Continued)

PAGE

Cases—(Continued)

Hunter vs Lakewood, 35 Ohio App. 132, 171 NE 842 (1930) 5

Jansson vs Swedish American Line, 185 F2d 212 (CA 1-1950) 4

Johns vs Hake, 15 Wash.2d 651, 131 P2d 933 (1942) 5

Karcher vs Burbank, 303 Mass. 303, 21 NE2d 542, 124 ALR 1292 (1939) 5

Kinsey vs William Spencer & Son Corp., 165 Misc. 143, 300 NYS 391 (1937), aff'd, 255 App. Div. 995, 8 NYS2d 529 (1938), aff'd, 281 NY 601, 22 NE2d 168 (1939) 5

Lewis vs Atlas Corporation, 158 F2d 599 (CA 3-1946) 3

Losito vs Kruse, 136 Ohio St. 183, 24 NE2d 705, 126 ALR 1194 (1940) 5

Lottawanna, The, 21 Wall. (88 US) 558, 22 L. ed. 654 (1875) 4

Reynolds Spring Co. vs L. A. Young Industries, 101 F2d 257 (CA 6-1939) 4

Serr vs Biwabik Concrete Aggregate Co., 202 Minn. 165, 278 NW 355 (1938) 5

United States vs Johnson, 98 F2d 462 (CA 8-1938) 4

Vokal vs United States, 177 F2d 619 (CA 9-1949) 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

SANFORD SERVICE COMPANY,
Petitioner - Appellant Below,

versus

HAROLD CASWELL,
Respondent - Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner respectfully shows:

I

QUESTION PRESENTED

The novel and important question of law presented for determination in this proceeding is:

> In reviewing a summary judgment in favor of a plaintiff in a maritime (Jones Act) case, from

which the plaintiff took no appeal, may the Court of Appeals ignore the lower court's factual finding that a ladder, whose collapse caused the plaintiff's injury, was furnished by a third party as the defendant's agent; and accordingly omit review of the lower court's holding, based on an erroneous interpretation of state law, rather than on maritime law, and specified as error by the appellant, that the plaintiff's release of the agent did not operate to release the defendant (principal) as well?

II

JURISDICTION AND OPINIONS BELOW

The jurisdiction of this court is invoked under 28 USC 1254(1).

Neither the opinion of the trial court nor that of the Court of Appeals has been reported.

III

SUMMARY STATEMENT OF MATTER INVOLVED

Petitioner's tank barge, with respondent in charge, was left at the Pacific Molasses Company's dock in New Orleans for loading. Employees of the Molasses Company lowered a ladder from the dock to the barge, but fastened it insecurely to the dock.

Respondent, having mounted the ladder, began to descend it. Because of the insecure fastening, the ladder

slipped and then partially collapsed, causing respondent to fall and break his arm. Respondent subsequently released the Molasses Company, attempting at the same time to reserve his rights against petitioner.[1]

Judgment for respondent in the trial court was affirmed by the Court of Appeals, both courts holding the tank barge unseaworthy for failure to carry a ladder, and petitioner accordingly liable for the defective condition of the ladder voluntarily supplied by the Molasses Company.

The district court's finding that the Molasses Company, in furnishing the ladder, did so as petitioner's agent, as well as its concomitant holding, based on an erroneous application of state law rather than on maritime law, that respondent's release of the Molasses Company did not release petitioner also, were ignored by the Court of Appeals, although the holding was specified by petitioner as error and respondent took no appeal.[2]

IV

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

While the precise question is apparently one of first impression, it would seem clearly improper for an appellate court—particularly in reviewing a summary judgment, which may be granted only on the basis of undisputed facts[3]—to fail to accept a factual finding below

[1] R 77-79.
[2] R 91.
[3] Vokal vs United States, 177 F2d 619 (CA 9-1949); Lewis vs Atlas Corporation, 158 F2d 599 (CA 3-1946).

on the basis of which appellant would, by the great weight of authority, be entitled to reversal.

Certainly such a course is in open conflict with the recent decision of the Court of Appeals for the Fourth Circuit that a trial-holding unfavorable to a party who has taken no appeal is not subject to review or correction if erroneous.[4]

In the instant case, the district court, having found that the Molasses Company furnished the defective ladder as petitioner's agent, based its concomitant holding, that respondent's release of the Molasses Company did not release petitioner as well, on the law of Louisiana rather than on maritime law.[5]

This result is directly contrary, not only to this court's holdings that maritime causes are governed by maritime and not by state law,[6] but to the law of Louisiana itself.[7] Further, the great weight of authority is to the effect that in a principal-agent, as distinguished from a joint-tortfeasor, situation, in which there is but one wrongful act by one party and but one liability—shared by the other party only vicariously, by reason of legal principle rather

---

[4] Harrington vs Empire Const. Co., 167 F2d 389 (CA 4-1948). See also Bothwell vs United States, 254 US 231 (1920); Reynolds Spring Co. vs L. A. Young Industries, 101 F2d 257 (CA 6-1939); United States vs Johnson, 98 F2d 462 (CA 8-1938).

[5] R 79.

[6] Garrett vs Moore-McCormack Co., 317 US 239 (1942); The Lottawanna, 21 Wall. (88 US) 558 (1874). See also Jansson vs Swedish American Line, 185 F2d 212 (CA 1-1950); Hall-Scott Motor Car Co. vs Universal Ins. Co., 122 F2d 531 (CA 9-1941), cert. den., 314 US 690.

[7] The holding was based on Louisiana decisions that release of one joint tortfeasor does not release another against whom rights are reserved. R 79. However, it is also settled Louisiana law that principal and agent are not joint tortfeasors. Cox vs Shreveport Packing Co., 213 La. 53 (1948).

than separate fault—a release of that liability as to either, and particularly as to the agent, the active wrongdoer, necessarily releases it as to both, regardless of any attempted reservation of rights.[8]

It is submitted that the serious procedural question raised by the action of the Court of Appeals, as well as the conflicts therein with decisions of this court, and with those of other circuits and of the courts of the very state whose law was sought to be applied below, should be resolved by this court.

EBERHARD P. DEUTSCH,
Proctor for Petitioners.

DEUTSCH, KERRIGAN & STILES,
Of Counsel.

February, 1953

[8] See Downer vs Southern Union Gas Co., 53 NM 354 (1949); Giles vs Smith, 80 Ga. App. 540 (1949); Geib vs Slater, 320 Mich. 316 (1948); Johns vs Hake, 15 Wash. 2d 651 (1942); Losito vs Kruse, 136 Ohio St. 183 (1940); Karcher vs Burbank, 303 Mass. 303 (1939); Federal Land Bank vs Birchfield, 173 Va. 200 (1939); Serr vs Biwabik Concrete Aggregate Co., 202 Minn. 165 (1938); Kinsey vs William Spencer & Son Corp., 165 Misc. 143 (1937), aff'd, 255 App. Div. 995 (1938), aff'd, 281 NY 601 (1939); Hunter vs Lakewood, 35 Ohio App. 132 (1930).

19

Office - Supreme Court, U.S.
FILED
APR
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1952

No. 639

SANFORD SERVICE COMPANY,

Petitioner-Appellant Below,

versus

HAROLD CASWELL,

Respondent-Appellee Below.

REPLY BRIEF OF RESPONDENT.

J. McHENRY JONES,
Proctor for Respondent.

HERBERT LATHAM,
WILLIAM DAVENPORT,
Of Counsel.

INDEX

	PAGE
I—QUESTION PRESENTED	1
II—JURISDICTION AND OPINION BELOW	2
III—SUMMARY STATEMENT OF MATTER INVOLVED	2-3
IV—HOLDING OF THE DISTRICT COURT	3-4
HOLDING OF THE CIRCUIT COURT OF APPEALS	4-5
V—REASONS THE WRIT SHOULD BE DENIED..	5-7

TABLE OF AUTHORITIES.

Cases:

Himmel Bros. Co. vs. Cerrick Corp., 122 Fed. 2nd 740 (CCA 7th, 1941)	5
Plomb Tool Co. vs. Sanger, 193 Fed. 2nd 260 (CCA 9th, 1951)	5, 6
Landry vs. New Orleans Public Service, 147 So. 698	6
American Stevedores Inc. vs. Porello, 330 W. S. 446, 458, 675 Ct. 847, 91 L. Ed 1011	6
McKenna vs. Austin, 134 F. 2nd 659	6
Spaulding vs. Parry Navigation Co., 187 Fed. 2nd 257	5, 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952.

No.

SANFORD SERVICE COMPANY,
Petitioner-Appellant Below,

versus

HAROLD CASWELL,
Respondent-Appellee Below.

REPLY BRIEF OF RESPONDENT.

Respondent respectfully shows:

I.

QUESTION PRESENTED.

The question presented is restated as follows: In reviewing a summary judgment in favor of a Plaintiff in a maritime "Jones Act" case the material facts of which are undisputed and from which the Plaintiff took no appeal, may the Court of Appeals refuse to consider a con-

clusion of the District Court that a ladder whose collapse caused the Plaintiff's injury was furnished by a third party as Defendants' agent where the undisputed facts of record show that such third party was not an agent but a mere volunteer and where the District Court further concluded that even if such third party was a volunteer then Defendants were liable, such latter conclusion being supported by affidavits of both Plaintiff and Defendants on motion for summary judgment.

II.

JURISDICTION AND OPINION BELOW.

The statement in Petitioners' brief is correct.

III.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioners' tug under command of its Captain left Petitioners' barge at the Pacific Molasses Company dock in New Orleans to be loaded with molasses.[1] Respondent, the mate, was left in charge of the barge with a deck hand to assist him and the other barges were taken by the tug to another dock.[2] The molasses company wharf was about ten feet or more higher than the deck of the barge.[3] The barge was not equipped with any ladder.[4] Employees of the molasses company lowered a ladder from the dock to

---

[1] R 68, 14, 24.
[2] R 68.
[3] R 69.
[4] R 15, 16.

the barge but fastened it insecurely at the top with a piece of electric wire.[5] The foot of the ladder was not fastened to the deck of the barge but rested on it.[6] Respondent ascended the ladder, went on the dock and shortly after started to descend with a heaving stick in his hand.[7] The heaving stick was to be used in jacking the hose in position in order to load the molasses through the hose to the barge.[8] Descending the ladder, the Respondent fell because a slackening in the fastening wire allowed the ladder to slip and the hooks holding the two sections of the ladder in the middle became disconnected.[9] Respondent settled with Pacific Molasses Company for $9500.00, released it from liability but reserved his rights against Petitioners.[10] The case was tried before a jury on the question of damages, only, and Respondent obtained a verdict for $15000.00; the Court entered judgment on the verdict for $5500.00 thereby crediting Petitioners with the $9500.00 paid by the molasses company.[10a]

IV.

HOLDING OF THE DISTRICT COURT.

The District Court held:

1. That the molasses company and Petitioners were joint *tort feasors.*[11]

---

[5] R 52, 66-67, 68-70.
[6] R 69.
[7] R 50, 51.
[8] R 69.
[9] R 68.
[10] R 71.
[10a] R 85, 86.

2. It was well known by the Petitioners that the barge would be docked at a place where the only means of ingress and egress would be by use of a ladder and as a ladder was a necessary part of the gear of the tug, failure to furnish it made the tug and barge unseaworthy.[12]

3. That the molasses company furnished the ladder as the agent of Petitioners.[13]

4. Even if the molasses company was a volunteer in furnishing the ladder, the Petitioners would be liable.[14]

5. That under the laws of Louisiana the release of one joint *tort feasor* did not release the other where the right to proceed against the other was reserved.[15]

HOLDING OF THE CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals held:

1. That Petitioners were guilty of negligence in that they knew that the barge would be docked at places where a ladder would be necessary and yet failed to provide one.[16]

2. That it was unnecessary to consider Petitioners' contention that the Court erred in holding the molasses company the agent of Petitioners since the District Court also held that Petitioners were liable even if the molasses company was a volunteer.[17]

---

[11] R 79.
[12] R 78.
[13] R 78.
[14] R 78.
[15] R 79.
[16] R 100
[17] R 100.

3. That the ladder was unseaworthy in that it was inherently defective or was inadequate for the purpose for which it was used.[18]

4. Inferentially held that the molasses company and Petitioners were joint *tort feasors* by holding Petitioners guilty of negligence and by affirming the District Court.

V.

REASONS THE WRIT SHOULD BE DENIED.

The fallacy of Petitioners' argument is demonstrated at the outset when they admit that the case was decided on summary judgment on undisputed material facts; they then contend that the finding of the trial court that the molasses company furnished the ladder as Petitioners' agent is a finding of fact; we submit that such was not a finding of fact but a conclusion, whether of law or fact, is immaterial since rule 52-A of the Federal Rules of Civil Procedure prohibiting setting aside findings of fact does not apply to conclusions of law nor to conclusions drawn from facts.[19] Such rule dealing with findings by the Court was not applicable where it was not the findings of the Court that were assailed but rather the conclusions drawn therefrom by the Court.[20] Where a District Court held that a salesman was an employee rather than an independent contractor such holding was not recognized by the Appellate Court because it was a con-

---

[18] R 100

[19] Himmel Bros. Co. vs. Serrick Corp., CCA 7th 1941, 122 Fed. 2nd 740; Plomb Tool Co. vs. Sanger, CCA 9th 1951, 193 Fed. 2nd 260; Spaulding vs. Parry Navigation Co., 187 Fed. 2nd 257.

[20] Himmel Bros. vs. Serrick, supra.

clusion rather than a finding of fact.[21] Examination of the authorities cited by Petitioners under note 4 of their brief reveals that all of said cases deal with findings of pure fact, indeed, the first case cited has to do with findings of fact as to the number of hours worked and the amount paid an employee in a wage hour controversy. An examination of the record, including Petitioners' own affidavits,[21a] will disclose that there is not a scintilla of evidence in the record to support the conclusion that the molasses company was, or acted, as the agent of Petitioners; such examination will disclose that the molasses company in furnishing the ladder was a mere volunteer; Petitioners brief ignores the conclusion of the trial court that even if the molasses company was a volunteer, Petitioners were liable. Further, Petitioners' position is untenable because the trial court found as a conclusion of law that the molasses company and Petitioners were joint *tort feasors*. This conclusion is supported by the record and was affirmed by the Appellate Court.[21b]

Error, if any, committed by the District Court in applying the law of Louisiana,[22] rather than maritime law, to the question of the release of one joint *tort feasor* with reservation of rights against the other, was harmless because under maritime law the usual rule is, in the absence of contract, for each *tort feasor* to pay the injured party a moety of the damage[23] and the Petitioners are not harmed because they are liable for less than half of the whole damage[24] and are not entitled to and have not

---

21 Plomb Tool Co. vs. Sanger, supra.
21a R 69.
21b R 69.
22 Landry vs. New Orleans Public Service, 147 So. 698.
23 American Stevedores Inc. vs. Porello, 330 W. S. 446, 458, 675 Ct. 847, 91 L. Ed 1011.
24 McKenna vs. Austin, 134 F. 2nd 659.

been deprived of contribution from the molasses company because Petitioners were guilty of primary negligence contributing to the injury.[25]

In conclusion it should be observed that Petitioners are here resorting to a clever stratagem to escape liability through an immaterial conclusion of the trial court that the molasses company was Petitioners' agent when in fact no such agency existed and are attempting to get this court to accept such conclusion as one of fact so that they can then urge the rule that since the molasses company, an agent, was released, the Petitioners, the principal, were released also.

It is submitted that no procedural question was raised by the action of the Court of Appeals and that their decision does not conflict with decisions of this Court or other circuits but is easily distinguishable.

---

[25] Spaulding vs. Parry Navigation Co., 187 Fed. 2nd 257.

J. McHENRY JONES,
Proctor for Respondent.

HERBERT LATHAM,
WILLIAM DAVENPORT,
Of Counsel.

April, 1953.

This is to certify that copies of this brief have been served on opposing counsel on this the .... day of ....., 1953.

.....